

Cause No. 10-0324

IN THE
SUPREME COURT OF TEXAS

Leslie Durio Pool,
Petitioner,

v.

Danae Durio Diana,
Respondent

*On Appeal from the Third Court of Appeals,
Austin, Texas*

MOTION FOR REHEARING

Terry L. Scarborough
State Bar No. 17716000
HANCE SCARBOROUGH LLP
111 Congress Avenue, Suite 500
Austin, Texas 78701
(512) 479-8888
(512) 482-6891 (facsimile)

Attorney for Petitioners

TO THE HONORABLE SUPREME COURT OF TEXAS:

In this will contest case, the trial court granted summary judgments disposing of the merits of the case and imposed \$109,500 in sanctions against a party and her attorneys. The court of appeals affirmed and added another \$30,000 in penalties. The courts below made numerous errors in regard to both the merits and sanctions. Some of the errors related to the trial court's sanctions order were discussed in the Petition for Review. But, because of page limits, other serious errors could not be discussed in the petition. The errors discussed herein and in the petition—and other errors—are plainly harmful to Petitioners. These errors have resulted in \$139,500 in sanctions against Petitioners and the loss of their meritorious claims.

Petitioners, Leslie Pool, Joe Pool, and Peter Ferraro, implore the Court to grant this motion, set aside its order denying their petition for review, and allow them to brief the case so that the errors below can be fully explained, which has been impossible to do in the limited number of page allowed so far.

ERRORS, ERRORS, ERRORS!

A. Sanctions

Most of the sanctions imposed in this case were pleading sanctions, not discovery sanctions. They were imposed under either Texas Rule of Civil Procedure 13 or Texas Civil Practice and Remedies Code Chapter 10, both of which allow a trial court to impose sanctions against a party and her attorney. Unquestionably, to the extent sanctions imposed against a litigant are substantial, they have a chilling effect on that party's willingness to seek redress of grievances in court and, potentially, a chilling effect on

other citizens' willingness to seek redress of grievances in Texas courts. *See* TEX. CIV. PRAC. & REM. CODE § 10.004(b) (sanction may be used to deter conduct by others).

The open courts provision of the Texas Constitution mandates that the state courts shall be open to all persons. TEX. CONST. Art. I, § 13. The right of access to the courts has been at the foundation of democracy in this country, and every Texas Constitution has contained the same open courts provision. *See LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986). The provision guarantees all Texans the right to redress their grievances in court. *Id.* at 341; *Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984). Thus, because the imposition of sanctions against a litigant or her attorney can chill the desire to seek redress in the courts of this state, the imposition of sanctions is a matter having constitutional ramifications. *See TransAmerican Nat'l Gas Corp. v. Powell*, 811 S.W.2d 913, 918-19 (Tex. 1991) (sanctions implicate due process concerns). It follows, therefore, that pleading sanctions must be imposed sparingly. They certainly should not arise because the trial court is angry (as happened here) and should not be based on mischaracterizations by opposing lawyers (as happened here). They must be just. *TransAmerican*, 811 S.W.2d at 917. These sanctions against Leslie Pool and her attorneys were not just.

What are the Rules for Sanctioning a Party or Attorney for “Maintaining” a Claim? As noted in Petitioners' petition for review, the trial court sanctioned Leslie and Joe under Rule 13 for maintaining groundless claims in bad faith.¹ The order specifically refuses to find, however, that the claims were groundless *ab initio*. Instead, the court

¹ 5 CR 1723, ¶ 17.

finds that the claims became groundless on or after April 13, 2007, when depositions were concluded.² Joe Pool signed the original petition and the first amended petition, but both of those pleadings were signed before April 13, 2007.³ The next pleading filed on Leslie's behalf—the second amended will contest—was filed on September 7, 2007, after Joe withdrew from the case.⁴ Does Rule 13 really allow an attorney to be sanctioned for a “maintaining a claim” in a pleading the lawyer did not sign? Even if the Rule allows the sanction, is a sanction just when the trial court specifically found that allegations made in the documents the attorney did sign were not groundless, but later became groundless? Is there an affirmative duty on a party to dismiss claims that discovery have shown to be groundless? (We can find no such duty either in the language of the Rule or Chapter 10 or the case law.) These questions deserve an answer. But no answer will be provided unless this Court grants review. Instead, lower courts will be left to assume that a lawyer can be sanctioned for allegations made in a pleading he did not sign and that a party may be sanctioned for failing to file a non-suit after some evidence adduced in discovery can be interpreted to make it appear that her claims are groundless.⁵

A Sanction Against Ferraro for an “Oversight” is Improper on its Face. The only sanction imposed by the trial court against Peter Ferraro is plainly inappropriate. His reputation is sullied on a basis that does not withstand even the most cursory scrutiny. In the trial court's Final Judgment, Mr. Ferraro is sanctioned \$1,000 under Texas Rule of

² 5 CR 1719, ¶ 7 (emphasis added); *see also* 5 CR 1727, ¶ 14 (again finding April 13, 2007, as date after which assertions were groundless).

³ *See* 1 CR 19 (filed December 11, 2006); 1 CR 28 (filed March 6, 2007).

⁴ 2 CR 423 (motion to withdraw); 3 RR (4/14/08) 67-68 (withdrawal order signed August 13, 2007).

⁵ Petitioners do not agree or concede that the claims were ever groundless.

Civil Procedure 13 in regard to a “Defamation Claim” allegedly brought by Ms. Pool. In paragraph 32 of the Final Judgment, the court states that Mr. Ferraro claimed that “he was unaware that the Defamation Claim was included in the Second Amended Will Contest” and that “it was an oversight that it was presented as a claim in the second amended pleading that he signed.” The court then states: “While the Court believes it was an oversight, the Court finds that Mr. Ferraro should have paid closer attention ... and should have had his client ... immediately dismiss the Defamation Claim.” Then, amazingly, the trial court concludes in paragraph 34 that Mr. Ferraro’s “oversight” violated Rule 13 “because [the] Defamation Claim was groundless and brought and maintained in bad faith and for harassment.” As a matter of law, a mere oversight by an attorney cannot be something the attorney did in bad faith or to harass. “Bad faith” is not simply bad judgment or negligence. *Falk v. Mayfield*, 974 S.W.2d 821, 828 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). It is the conscious doing of a wrong for a dishonest, discriminatory, or malicious purposes. *Texas Mutual Ins. Co. v. Narvaez*, 312 S.W.3d 94, 100 (Tex. App.—Dallas 2010, pet. filed); *Mattly v. Spiegel, Inc.*, 19 S.W.2d 890, 896 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Stites v. Gillum*, 872 S.W.2d 786, 794-96 (Tex. App.—Fort Worth 1994, writ denied). Improper motive is an essential element of bad faith. *Elkins v. Stotts-Brown*, 103 S.W.3d 664, 669 (Tex. App.—Dallas 2003, no pet.). On its face, this sanction fails. An “oversight” is not bad faith. Yet it will stand unless this Court grants review.

Leslie Never Stated a “Defamation Claim,” Yet She was Sanctioned for Doing So. As noted above, Ferraro is sanctioned \$1,000 in regard to a “defamation claim”

allegedly asserted by Leslie in her second amended petition. Leslie, too, was sanctioned for that claim—\$6,000. The problem is that Leslie never asserted a defamation claim. Her second amended petition talks about alleged defamatory statement by Danae, but no relief is sought in the body of the petition or the prayer. The allegations of defamation were stated to show reasons why Danae was a bad candidate for executrix of Donn’s estate. When, if ever, has merely discussing something in the fact section of a pleading resulted in a sanction against a party and attorney? The mere assertion of facts might be grounds for a sanction if the statements are highly inappropriate or inflammatory, like racist, threatening, or obscene statements. But a mere allegation that one party said something bad about another party should not be sanctionable, as a matter of law. Nonetheless, both Leslie and her attorney were sanctioned for allegedly asserting a “claim” that was not asserted at all, and that relates to facts that were innocuous. It is just wrong, yet it will stand unless this Court grants this motion for rehearing.

Sanctions for Joining Stephen Iler were Inappropriate when Iler was a Proper Party. The 1994 will contains a specific bequest of a Rolex watch to Stephen Iler and provides that the residuary estate is to be distributed to Marianne.⁶ Thus, according to the application to probate the will, Iler and Marianne “constitute all of the distributees of the Estate.”⁷ On February 23, 2007, Danae filed a discovery response stating that both Marianne and Iler were potential parties to the case because they were beneficiaries under the will.⁸ Thus, two weeks later, in her first amended will contest, Leslie named Marianne

⁶ 1 CR 11.

⁷ 1 CR 4, ¶14.

⁸ 1 CR 117 (served February 23, 2007).

and Stephen Iler as parties because of their interest in Donn's estate.⁹ Marianne and Iler filed answers less than two weeks later,¹⁰ and Iler stated that he "disclaim[ed] his interest in the Estate" and asserted that Leslie's "continuance of this suit against Iler would be harassing and frivolous"¹¹ But Iler did not actually disclaim his interest in the estate. Instead, Iler filed a sworn disclaimer disclaiming only "any and all interests he may have in Decedent's Rolex watch."¹² At any rate, less than a month after Danae's lawyer served a document informing Leslie that Marianne and Iler were potential parties to the case, the same lawyer filed a document threatening Leslie with sanctions for having added Iler to the case; and he did so on the day Iler took the step that might be a basis for his dismissal.¹³

Later, on November 13, 2007, Leslie filed a motion to compel Danae and Iler to respond to requests for disclosure.¹⁴ Two days later, on November 16, 2007, Leslie served discovery requests on Iler.¹⁵ Ten days after that, Iler moved for the first time to be dismissed from the suit and for sanctions against Leslie and her attorneys "for their harassing conduct of maintaining Mr. Iler as a party when there is no basis"¹⁶ And he sought protection from Leslie's discovery requests to him.¹⁷ On December 4, 2007, the trial court denied Leslie's motion to compel; granted Iler's motion for protection from

⁹ 1 CR 28-29, ¶¶4, 5.

¹⁰ 1 CR 98; 1 CR 100.

¹¹ 1 CR 98, ¶2.

¹² 1 CR 102-03, ¶1.

¹³ 1 CR 100. Marianne asked only that the suit be dismissed, but did not claim that her presence was improper, which was further evidence that the attorney for the estate, Iler, and Marianne viewed any person having an interest in the estate as a proper party.

¹⁴ 4 CR 956.

¹⁵ See 4 CR 1026.

¹⁶ 4 CR 973.

¹⁷ 4 CR 1005.

discovery; assessed a \$2,500 sanction against Leslie, Joe, and Ferraro for serving discovery requests on Iler solely for the purpose of harassment; granted Iler's motion to dismiss; assessed a \$1,000 sanction against Leslie, Joe, and Ferraro because Leslie's second amended will contest was groundless and brought and maintained solely for the purpose of harassing Iler.¹⁸ Leslie argued that Iler's disclaimer was insufficient because it did not disclaim all interest in Donn's estate but, instead, only his interest in the Rolex; and that the disclaimer was ineffective as a matter of law if Iler had accepted the Rolex before filing the disclaimer, which Leslie was not able to determine without obtaining discovery responses from Iler.¹⁹ Iler's attorney (also Danae's attorney) ignored the entreaty to disclose whether Iler had accepted the Rolex before filing the disclaimer, and the trial court did not endeavor to find out.

The sanctions related to the claims were clearly unwarranted under these facts. Leslie had no duty to dismiss someone who admittedly and by law was an appropriate party to the case. If anything, that person had a duty to seek his own dismissal. Furthermore, if the conduct was sanctionable, Danae committed the same conduct as Leslie because Danae made no effort, as the proponent of the will, to dismiss Iler from the case. Likewise Marianne failed to dismiss Iler but was able to avoid the sanctions imposed upon Leslie and her attorneys.

Sanctions should not be Awarded to a Putative Executor. When Leslie was allegedly committing sanctionable acts, the will had not been admitted into

¹⁸ 4 CR 1088; 4 CR 1089; 4 CR 1090; *see also* 12/4/07 RR.

¹⁹ 12/4/07 RR.

probate.²⁰ When no will has been admitted into probate, it is a breach of fiduciary duties for the putative executor to seek sanctions from an heir for the putative executor's own personal gain. Danae has no standing to pursue sanctions against Leslie for her own benefit; only for the benefit of the estate or possibly for an heir. Danae by her own filing of the will that disinherits her is no longer an heir, because of her judicial admission. Orders of sanctions state that they were for her own benefit.

The Fourth Court of Appeals has previously held that attorney's fees expended in connection by one who contests his own removal as administrator of the estate, especially where "[t]he evidence fails to show that the contest for the administratorship was in the interest of the estate, but indicates it was rather in the interest of [the removed administrator]" should not be permitted. *Dyess v. Rowe*, 177 S.W. 523, 523 (Tex. Civ. App.—San Antonio 1915), *aff'd in part & rev'd in part on other grounds*, 213 S.W. 234 (Tex. Comm'n App. 1919, judgm't adopted). We agree. *In re Estate of Washington*, 289 S.W.3d 362, 369 (Tex. App.—Texarkana 2009, pet. denied).

If sanctions sought for benefit of estate they would have had to comply with: Texas Probate Code section 234 (Exercise of Powers With and Without Court Order). *See Hill v. Bartlette*, 181 S.W.3d 541, 549 (Tex. App.—Texarkana 2005, no pet.) ("The Probate Code authorizes the 'personal representative' of an estate to '[m]ake compromises or settlements in relation to property or claims in dispute or litigation' on written application to the court."); *Riley v. Riley*, 972 S.W.2d 149, 152-53 (Tex. App.—Texarkana 1998, no pet.) ("[F]or TPC 234(a)(4) to apply the property or claim must be in

²⁰ *See* 5 CR 1714 (same order admitting will to probate imposes sanctions).

dipute or litigation... Furthermore, the statute contemplates a settlement or compromise of a dispute between the estate and a claimant. ... Authority for the conveyance [of estate property to settle the dispute] comes from TPC 234(a)(1), which permits the ‘purchase or exchange’ of property when a personal representative deems it for the interest of the estate and with authority from the court.”) The purported will does not provide for independent administration of the estate, so until a dependant administration is changed to independent administration (which was applied for and occurred March 25, 2008 when the purported will was admitted into probate), every action of the personal representative must be approved by order of the court. In this case all disputes involving sanctions and moved upon were done without application to the court for approval and in violation of Texas Probate Code section 234. The precedent of allowing a personal representative to seek sanctions against an heir-at-law before the representative has any authority in law or from the court will have a chilling effect, making probate courts more accessible to aggressive penalty-seeking litigants and less accessible to those who simply wish the court to determine heirship rights in the estate as happened here. Precedents which provide a punishing disincentive for the public to exercise statutory rights stated in Texas Probate Code is a bad precedent; statutory right to contest a will.

Awarding monetary payments to an executor allows the executor to be compensated in excess of the five percent fee permitted by the Texas Probate Code. *See* TEX. PROB. CODE § 241. Indeed, the Probate Code is clear: “in no event shall the executor or administrator be entitled in the aggregate to more than five per cent (5%) of the gross fair market value of the estate subject to administration.” *Id.* (emphasis added).

Here, Danae will receive nothing under the purported will, yet she will be compensated for administering the estate and will receive additional compensation as a penalty paid by Leslie and her attorneys. This extraordinary compensation to a fiduciary creates an incentive for a putative executor to violate her duties to potential heirs. Sanctions are not just when they are invoked through a breach of fiduciary duty.

B. Merits

Before imposing substantial sanctions on Leslie and her attorneys, the trial court disposed of Leslie's claims through a series of summary judgments. In effect, both the trial court and the court of appeals determined that the face of a will itself cannot provide evidence that the will was executed without sufficient formalities or is a forgery, or that the testator lacked capacity when the will was executed. Sadly, the lower courts reached this conclusion without actually addressing this important and controlling question of law. Instead, the lower courts treated Leslie and her attorneys like they were idiots for raising the argument, granted summary judgments disposing of Leslie's claims, and sanctioned her for bringing groundless claims. All of this was error.

Leslie Presented Summary Judgment Evidence Raising a Fact Issue on Forgery and Lack of Formalities. The court of appeals stated Leslie was required to produce evidence raising a genuine issue of material fact in support of her claim that the will was a forgery or was not executed with sufficient formalities in response to Danae's summary judgment motion. *Slip Op.* at 14. The court then noted that, in attempting to meet this burden, Leslie pointed to the face of the will. *Id.* Specifically, as recounted by the court of appeals, Leslie pointed out 13 specific items on the face of the will that

suggested that the will was a forgery or not executed with sufficient formalities. *See Slip Op.* at 15. According to the court of appeals, “As evidence that the will was forged or not properly executed, Leslie offers nothing more than some typographical errors and her own belief that the manner in which Donn chose to dispose of his property was unreasonable.” *Slip Op.* at 15-16. This statement is simply incorrect. Not one of the listed items can be fairly classified as a typographical error, and nothing in the list of 13 items can be called an expression of Leslie’s “belief that the manner in which Donn chose to dispose of his property was unreasonable.” Each and every one of the items points out a fact about the will. The court goes on to state that “Leslie’s evidence is little more than a list of her own suspicions that lead her to conclude that the will might be a forgery.” Again, this is simply incorrect. It is not a list of suspicions, but a list of facts about the purported will. A court of appeals does not have the latitude to mischaracterize the facts or arguments for the purpose of reaching a result.

After mischaracterizing the facts, the court of appeals concludes that Leslie’s did not raise a fact issue about whether the will was forged. The court, however, makes no effort to analyze whether the 13 stated facts are evidence of forgery or the lack of formalities. And it also makes no effort to answer the question of law that is presented: can the face of a will provide evidence of forgery or a lack of formalities? Surely it can.

Assume, for example, that Michael Dell has died and a will is offered for probate by the Dell’s housekeeper that gives Michael’s entire estate to the housekeeper. Assume further that a footer on the will indicates that it should have 50 pages, but the will offered for probate has only five pages; the pages of the will having the signatures are printed in

a different font than the pages that precede the signature pages; and the will lists the housekeepers children as Michael's children. Wouldn't these problems appearing on the face of the will indicate that the will was a forgery (*i.e.*, not what it purports to be)? If Mrs. Dell challenged the will as a forgery, wouldn't these facts, standing alone, be sufficient for Mrs. Dell to survive the housekeeper's motion for summary judgment? Would Mrs. Dell be sanctioned for claiming that the will offered by the housekeeper was a forgery? Those are the facts presented in this case, yet the trial court and court of appeals—without any real analysis—concluded that Leslie Pool not only failed to present evidence of a forgery, but filed a groundless pleading in bad faith or for the purpose of harassment. The decision of the courts below lacks analysis, is contrary to common sense, and is plainly incorrect. But, again, it will stand unless this Court grants review and announces the common sense rule that the face of a will, standing alone, can provide evidence that a will offered for probate is not what it purports to be (*i.e.*, it is a forgery).

The Presumption of Proper Formalities Cannot be Elevated to become Irrefutable. The Texas Probate Code provides that “if a will is self-proved as provided in this Code, no further proof of its execution with the formalities and solemnities and under the circumstances required to make it a valid will shall be necessary.” TEX. PROB. CODE § 84(a). If it is not self-proved, as provided in the Probate Code, an attested written will produced in court may be proved by the sworn testimony or affidavit of one or more of the subscribing witnesses thereto, taken in open court or provided by deposition, or, in some circumstances, by testimony of witnesses familiar with the testator's handwriting. *Id.* § 84(b).

Probate Code § 59 provides for the requisites of a will, including the form and content of a self-proving affidavit. “A will with a self-proving affidavit subscribed and sworn to by the testator and witnesses attached or annexed to the will is a “self-proved will.” *Id.* § 59(b). “A self-proved will may be admitted to probate without the testimony of any subscribing witness, but otherwise it shall be treated no differently than a will not self-proved.” *Id.* § 59(c). Thus, there is a presumption of law that a self-proved will is entitled to admitted to probate. But just because a will has a self-proving affidavit does not mean that it is a valid self-proved will that must be admitted to probate.

Again, assume Michael Dell’s will as submitted by the housekeeper has a self-proved affidavit stating that there are 50 pages in the will; yet the will submitted by the housekeeper for probate consists of only five pages. It is a self-proved will that must be admitted to probate without the housekeeper carrying any additional burden of proof? Clearly, that would be ridiculous. What if the reference is 50 pages is stricken (*i.e.*, 50) and “5” is written instead, and the initials “MD” are added; would the will then be admitted to probate without further question? Simply having a self-proving affidavit is not enough to require admission of a will to probate when the face of the will shows a problem with the self-proving affidavit. If the self-proving affidavit is plainly suspicious, a court should not accept it as an irrefutable presumption of law, and require the will contestants to find more and more evidence to disprove the will.

The self-proving affidavit in Donn’s will reveals problems. The number of pages is changed and initialed. But the initial (a “D”) does not look like the D in Donn’s signature. Instead, it looks feminine. And the number of pages stated in the self-proving

affidavit for the “above instrument” are not the number of pages appearing above the signatures. These obvious problems on the face of the self-proving affidavit raise issues as to whether the will was executed with the required formalities and whether it is a forgery.

The court of appeals opinion concludes that Leslie failed to produce evidence on the lack of formalities, but the will itself provides the necessary evidence. Leslie does not have to. The will’s attestation clause provides that “we, the undersigned, hereby certify that the above instrument ... consists of ~~3~~ 5 pages, including this page ...” The instrument above that point in the document (*i.e.*, the “above instrument”) clearly does not consist of either three or five pages. It is an incorrect statement in the clause that is supposed to prove the authenticity of the will. This is evidence of a forgery (because several pages may have been taken out of the will after it was executed) and the lack for formalities. It cannot be disregarded by referring to it as a “typographical error” or as “speculation.” *See Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993) (appellate courts “are not empowered to convert mere suspicion or surmise into some evidence”). What makes the error worse is that the attestation statements stating the above pages are 5 or 3 are presumptions of law. *Seydler v. Baumgarten* 294 S.W.2d 467, 479 (Tex. Civ. App.—Galveston 1956, writ ref’d n.r.e.) (attestation clause raises a presumption of law). As presumptions of law, these attestation statements without any competent contradicting evidence, compels the court to reverse the admission of the will into probate. And, because two years have passed since the admission of the will, it requires the conclusion as a matter of law that Donn Durio died intestate. Because

CERTIFICATE OF SERVICE

I certify that on November 8, 2010, a copy of this motion was served by first-class, United States Mail on:

Tracy J. Willi
WILLI LAW FIRM, P.C.
9600 Escarpment Blvd.
Ste 745, PMB 34
Austin, Texas 78749-1983

Attorney for Respondent

_____/s/
Terry L. Scarborough